BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Outstanding in importance in this case, not only to the liberty of the appellants themselves, but also to the state of the jurisprudence, is the question of whether, under the circumstances of the particular banking transaction involved, *there was a use of the mails within the meaning of the mail fraud statute.*

We respectfully say that this question has been not only erroneously, but inadequately dealt with in the judgment of the Circuit Court of Appeals.

When the prosecutor investigated the Bienville Hotel sale and contemplated a federal court indictment in connection therewith, he found no use of the mails which he could act upon *related to the alleged fraud.* The best he could do was to begin *after* the time when Hart, in all practical as well as legal effect, had sold the $75,000.00 check to the City Bank in New Orleans. This left, for the prosecutor to rely upon, only the subsequent mailings in connection with the bank clearings between New Orleans and Baton Rouge (of the check then owned by the City Bank).

Knowing then, and as we know now, and as we think this Court should reaffirm now, that there can be no responsibility for crime save for an act knowingly done by a person himself or through his agent, collusive or

innocent, the prosecutor wrote in this indictment (Record, Vol. I, page 8) that in clearing the $75,000.00 check through the mails, the Federal Reserve Bank acted "as agent for the defendants herein", and he undoubtedly meant an "innocent agent."

But, by so doing, the prosecutor pleaded in the very teeth of *Burton vs. United States*, 196 U. S. 283, in which the Supreme Court of the United States has laid down the rule, universally accepted today, that when a payee deposits a check in ordinary course in a bank (the case must be even stronger where he cashes it) the bank becomes the owner thereof. Said the Supreme Court: "It (the bank) was IN NO SENSE the agent of the defendant for the purpose of collecting the amount of the check from the trust company on which it was drawn." (Italics ours.)

The *Burton* case was a criminal case. It was absolutely on all fours with the case at bar on the point of the non-representative capacity of the bank in clearing the check involved, and its language has never been contradicted or qualified in over 35 years. It is the leading case in all American jurisprudence on the subject today. The prosecutor and the trial judge could not ignore it. They had to get around it.

BANK COULD NOT BE AGENT.

This was accomplished by freely conceding in the charge to the jury that the predicate of the indictment was "surplusage" and an error, that the City Bank "became

the owner of said check and subsequently said bank could not in the strict legal sense have acted as defendants' agent in the collecting of their own check. You are therefore instructed to treat this charge of agency as "surplusage" (Record, Vol. II, page 1011).

It will be noted that, in an identical legal situation in the *Burton* case, the United States Supreme Court said that the bank could be "IN NO SENSE" the agent of defendant. Judge Borah trimmed the language of the Supreme Court just enough to get the government's case under the jurisdictional wire. He said the bank could not in "THE STRICT LEGAL SENSE" have been the defendants' agent. The Supreme Court was all-exclusive against the existence of an agency. Judge Borah left the door open just wide enough for something which he indicated need not be a "strict legal" appreciation of agency.

What was this not-such-a "strict legal sense" of criminal agency which the charge of Judge Borah resorted to? Which he resorted to despite the United States Supreme Court's language in the *Burton* case. And by which he gave the jury the opening it needed to hold that this was a mail fraud case.

That not-such-a "strict legal sense" of agency turned out to be what Judge Borah defined to the jury as "causation."

Judge Borah's charge on causation has produced, we think, a new and novel idea that there can be in criminal law a chain of causation *without an agent*.

In other words, that there can be criminal responsibility other than that existing from a knowing act, effected personally or through an agent, collusive or innocent, contrary to the fundamental rule on human responsibility for crime.

Or, to state it another way, that one who is debarred by a legal rule from being an agent, can still be an agent.

But in order to phrase such a charge on "causation", Judge Borah, just as he had "fudged" a bit (and we use the expression respectfully) on the language of the United States Supreme Court in the *Burton* case, had to "fudge" a bit more on the language of the rule generally expressed in the jurisprudence of "causation". At the top of page 1010, Vol. II, of the Record, we find that Judge Borah, in charging the jury on causation, used the language, with one slight but very significant addition, which had been used by Judge (late Justice) Van Devanter in deciding the *Demolli* case, 144 Fed. 363. In the *Demolli* case that language read:

> "Nor is it essential to the commission of the offense that the objectionable matter be deposited in the mail by the offender himself, or by another acting under his express direction, because he is equally responsible if it is deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect."

Judge Borah charged the jury in the case at bar as follows (added words italicized):

> "With reference to this question of causation you are instructed that it is not essential to the commis-

> sion of the offense that the check, letter or writing be deposited in the mail by the defendant himself *or by an AGENT* or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect."

Plainly stated, what Judge Borah has done in this case was to tell the jury that the banks could not be defendants' agents in clearing the $75,000.00 check, but that this made no difference because "causation" could be effected *without even an "agent"*.

CAUSATION ONLY THROUGH AGENT.

Up to the moment Judge Borah spoke, the *Demolli* case, and all the other cases on the subject, had stood for the proposition that "causation" could result without the defendant's personal act, or an act of another by his express direction; but we think it has always been recognized and still must be recognized that "causation" cannot result in the absence of any agent", albeit an innocent agent. Otherwise the basic principle of law on the extent of criminal responsibility which we have already cited has become meaningless. Yet Judge Borah told this jury that causation could result without even *any kind of agent,* innocent or otherwise; and he gave the jury that instruction because he also was obliged to tell them that the only intervening party in the mailings, the bank, could not, under the *Burton* case, be such an agent—*"in no*

sense", had said the United States Supreme Court in the *Burton* case.

Judge Borah dispensed with any "agent" in his doctrine of "causation" of the mailings, since the jury had to be told the bank could not be an agent, *and there was no other possible agent for the mailings in the case*, and an acquittal must have resulted from a correct statement of the law, properly followed by the jurors.

This dispensing with the necessity for any agent, under the trial court's own peculiar doctrine of "causation" of mailing, was, of course, error. It was a substantial error, one which persisted from the overruling of the defendants' demurrer, through the refusal of a direct verdict and the charge to the jury down to the denial of a new trial and arrest of judgment. It was an error which has been repeated by the Circuit Court of Appeals in its judgment, holding that (page 6 of the printed judgment) "this case is different" (from the Burton case), when there is not the slighest difference in the legal principle on the agency in the mailings.

The holding that mailings in violation of the mail fraud statute could have taken place, under the facts existing in this case, and for the reasons set forth in the trial court's charge, was clearly error, and the Circuit Court of Appeals has given new life of reported precedent to that error.

See also *City of Douglas vs. Federal Reserve Bank*, 271 U. S. 489.

We respectfully submit that the trial court's holding on this point is contrary to these decisions of the United States Supreme Court.

The ruling that the mere cashing of a check is in itself "causing the mails to be used" within the purview of the Mail Fraud Statute because the bank cashing the check, and thus becoming the owner of it, may, in subsequent dealings with its own property, use the mails in the customary course of business, after the object of the alleged scheme has been accomplished, is such an extension of the scope of the penal statute of the United States and so far beyond anything intimated in any decisions of the Supreme Court of the United States that the Circuit Court of Appeals should not have attempted to expand this penal statute as it did in its opinion of May 24, 1940. As the Supreme Court of the United States stated in *United States vs. Brewer,* 139 U. S. 278-288:

> "Before a man can be punished, his case must be plainly and unmistakably within the statute, United States v. Lacher, 134 U. S. 624."

We respectfully submit that this case of petitioners is not clearly within the statute; that this Court erred in failing to follow the *Burton* and *City of Douglas* cases.

AGENCY INSEPARABLE FROM "CAUSATION."

The element of an agency through which the defendant acts, whether that agency be collusive or innocent, is as inseparable from and indispensable to the third-person

mailing of a letter to execute a fraud, as it is inseparable from and indispensable to the general rule of horn-book law that any criminal act must be done either by one's self or through an agent, though the latter may act innocently. It is solely through the principle of agency that acts or declarations of others can be admissible against a defendant, each member in a common unlawful undertaking being constituted the agent of the others in the eyes of the criminal law. (*Hitchman Coal & Coke Co. vs. Mitchell*, 245 U. S. 229, 249.)

The moment the element of "agency" is lacking, criminal responsibility of the alleged principal ceases *in every way.*

For a trial judge to conduct a case upon the judicial view, or to instruct a jury, that criminal responsibility can flow to an accused from the act of a third person, to the extent that it is not even essential for that third person to have acted as the agent of the accused in the doing of the alleged criminal act, would be to break down the limitations which the law has always placed upon human responsibility for crime and throw the door open wide to jury-room conclusions that one man can be guilty of the independent act of another.

This is exactly what has been done in the case at bar.

To re-state the point, the jurors were told, as they had to be, that the banks could not have acted as Hart's agents in the clearing of the check; but, since there could not have been any other agent, the jurors were improperly told that Hart and his co-defendants could have committed the crime *without any agent,* that it was not essential to the commission of the offense (Record, Vol. II,

page 1010) that the check, letter or writing be deposited in the mail by the defendant himself OR BY AN AGENT or another acting under his express direction."

Absence of the element of a necessary agency was explained away under the theory of "causation", or the "natural and probable consequence" rule, without regard to the fact that even in a chain of causation or natural and probable consequence, the accused must still act by the hand of an agent, or not at all. *Absent the agency, absent the crime.*

Where the prosecution in the instant case bumped its head against the proverbial brick wall (and yet, so far successfully) was that where a check is sold outright (or even sold by unrestricted deposit) necessary considerations in the law have compelled the courts to reason that the check necessarily becomes the property of the bank, and what it does with the check from that moment is the will of the bank, from which no other person can derive any contradictory rights and, conversely, for which no other person can be made to suffer responsibility.

Hence, the bank in clearing the check, either in the *Burton* case, or in the case at bar, "in no sense" could have been the agent of the defendants.

But the prosecution was almost fanatical in the case at bar to retain federal jurisdiction through the mail fraud statute, so it urged the contention that crime could be "caused" by the hand of a third person even where the existence of the element of agency was prohibited by

law; in other words, that an independent, intervening will could carry out the defendant's alleged criminal act, simply because that independent intervening will, unconscious of the alleged criminal nature of the act, proceeded independently of the defendant, legally and practically, to do something which might have been expected in usual course by the defendant at the inception of the transaction, but which the independent, intervening will could have refrained from at choice, and did at its own volition, and "in no sense" as the agent of the accused.

This insistence in pleading "causation" in defiance of non-existence of agency (which had to be and was charged out of the case), found its sympathetic echo in the charge of the court, by engrafting words on the *Demolli* decision, that "agency" was not essential to causation.

For a court to hold that Hart "caused" a crime to be committed, where letters were placed in or taken from the mails by persons who the trial judge had to charge could not under the law be his agents, is a veritable contradiction in terms.

"Cause", as used in the mail fraud statute, means that the defendant intentionally employed an agent, innocent or otherwise, to place the letter in the mail. To say that the defendant "caused" the act, but that the person who placed the letter in the mail could not have been the defendant's agent is to state two irreconcilable propositions, each destroying the sense of the other.

In fact, up to the time of Judge Borah's charge, there has never been a case, as far as we can find, wherein

"causation" was ever disassociated from "agency". Take the *Kenofskey* case, 243 U. S. 440, so heavily relied upon by the prosecution.

"Cause" was defined by Mr. Justice McKenna in the *Kenofskey* case as follows:

> " 'Cause' is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proof to his superior officer, and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. *He became Kenofskey's* agent for that purpose and the means by which he offended against the statute. Demolli v. U. S., 144 Fed. 363." (Italics ours.)

In *Sallinger v. Loisel,* 265 U. S. 224, 234, Mr. Justice Van Devanter, in discussing the third clause of Section 215, making it an offense for the deviser of the fraudulent scheme to cause a letter to be delivered by mail according to the direction thereon, states:

> "A letter may be mailed without being delivered but if it be delivered according to the address, the person who causes the mailing causes the delivery. Not only so, but the place at which he causes the delivery is the place at which it is brought about in regular course *by the agency which he uses for the purpose.* U. S. v. Kenofskey, 243 U. S. 440, 443."

In *Demolli v. U. S.*, 144 Fed. 363, where the use of the mails to transmit obscene matter was involved, Mr. Justice Van Devanter (then a Circuit Judge) held that the defendant caused the matter in question to be deposited in the mails because "He set in operation and *made use of an agency* which, as he knew at the time, would, according to its established and regular course, carry the objectionable matter through the mails to the person to whose attention he designed it should be brought * * *."

"Cause" as used in the Mann Act, punishing any person who shall "cause" the transportation in interstate commerce of any woman for immoral purposes means *"to effect a thing as an agent, to bring it about." Huffman v. U. S.*, 259 Fed. 35.

"Cause" as defined in Black's Law Dictionary, Third Edition, is *"to effect a thing as an agent; to bring it about. Huffman v. U. S.*, (C. C. A.) 259 F. 35, 38; *Shea v. U. S.*, (C. C. A.) 251 F. 440, 447."

"Cause" as defined in Webster's new International Dictionary, Second Edition, is "to be the cause or occasion of; *to effect as an agent; to bring about;* to bring into existence; to make."

As said by the Court in *Machette v. U. S.*, 90 Fed. (2) 462, 464:

> "Appellant Hanecy placed the Voelker check for $2,500.00 described in the first count of the indictment, with the Marshall & Illsley Bank of Milwaukee *for collection*, and by so doing the bank became *his*

agent and he became responsible for any use of the mails which the bank employed in making collection. Spear v. U. S., (C. C. A.) 228 F. 485. Likewise, all others who were engaged in the conspiracy or who were partners of Hanecy in the joint enterprise, including appellant, Machette, were responsible for the use of the mails by the bank. U. S. v. Bender, et al., (C. C. A.) 60 F. (2) 56."

As stated by the Court in *Spear v. United States,* 246 Fed. 250, 251:

"The drafts and checks had been received from the victims of the fraudulent scheme by those actively engaged in conducting it. The latter turned them over to Spear and he delivered them to a local bank *for collection. The bank did not cash them, but accepted them for collection.* Part of the scheme was to keep the victims quiescent until reports of payment were received. Collection of the drafts and checks was essential to the full consummation of the fraud, and the evidence of Spear's guilty assistance was sufficient. When he intrusted them to the bank *he made it his agent,* although it was innocent of the fraud. U. S. v. Kenofskey, 243 U. S. 440. The draft and checks were drawn on banks in distant cities. The custom among banks, almost invariably is to forward such collection items by mail with letters of transmittal, and Spear must have known the local bank would follow the ordinary course in the absence of instructions to the contrary. When the bank deposited the letters of transmittal in the mails, Spear, in legal effect, caused them to do so. U. S. vs. Kenofskey, 243 U. S. 440."

It is to be noted that the defendants' responsibility for "causing" the use of the mails employed by the bank in

collecting the drafts and checks is predicated solely upon the operation of the principle of agency, the court holding that the bank, although innocent of the fraud, was the agent of Spear in collecting the drafts and check. It is also to be noted that the court, in its opinion, was particular to emphasize the fact that "*the bank did not cash them* but accepted them for collection", thus clearly indicating that its decision would have been different had the drafts and check been cashed by the bank and not accepted for collection, as in the instant case.

In each of the following cases the responsibility of the defendants for "causing" the use of the mails employed by a bank in forwarding a check received by them *for collection* was based solely upon *the operation of principal and agent; Spear vs. U. S.*, 228 F. 485, 488; *Spear vs. U. S.*, 248 F. 250, 251. *Tincher v. U. S.*, 11 F. (2) 18, 21. *Machette v. United States*, 90 F. (2) 462, 464. *Goodman v. U. S.*, 97 F. (2) 197, 199. *Smith v. U. S.*, 61 F. (2) 681, 684. *Mazuroskey v. U. S.*, 100 F. (2) 958. *Corbet v. U. S.*, 89 F. (2) 124.

The Circuit Court of Appeals based its finding that "Hart clearly caused the mails to be used in furtherance of the scheme to defraud" upon the fact that "when Monte Hart presented the check to City Bank Branch it could be reasonably foreseen that in the usual course of events the check would pass through the United States mails to Baton Rouge to be paid." It is to be noted that the Court in reaching its conclusion utterly disregarded the salient fact that when Monte Hart presented the check to the City Bank Branch *the bank cashed the check and did not receive it for collection.* The Court by such find-

ing made knowledge, that is, whether the use of the mails may fairly be foreseen, the final and all-inclusive test of the violation of the statute.

"However", as said by Judge Foster in *Spillers v. U. S.*, 47 F. (2) 894, "it is not every incidental use of the mails that occurs as a result of the scheme that would constitute a violation of the law. The letter must be knowingly mailed or be caused to be mailed in furtherance of the scheme by the defendant." It is only after the proof shows that a defendant mailed or caused a letter to be mailed in furtherance of a scheme to defraud that we need go into the question of knowledge, that is whether the steps taken to execute the fraudulent scheme did under the circumstances known to the defendant naturally and probably result in the use of the mails.

LETTERS NOT MAILED IN FURTHERANCE OF SCHEME TO DEFRAUD.

When Hart presented the $75,000.00 L. S. U. check to the City Bank Branch, the bank cashed the check, and thereby became its owner. The letter containing the check was placed in the mails to be forwarded to the bank upon which it was drawn so that the check might be paid. Payment was sought by the Whitney Bank for itself as owner. The final payment of the check by the City National Bank at Baton Rouge was a payment, not to Hart, but to the Whitney Bank. At the time the letter was deposited in the mail Hart had no interest in the check, having sold it to the Whitney Bank and received its face amount, the $75,000.

The act of the Whitney Bank in causing the check to be placed in the mail to be forwarded to the bank upon which it was drawn, for the purpose of obtaining payment for the paper which it had purchased from Hart, as held in *U. S. v. Burton*, "can in no sense be said to be an action of an agent for its principal, but the act of an owner in regard to its own property." The check was sent forward to be paid and the Whitney Bank was its owner at the time. The letter was placed in the mail to further the interests of the Whitney Bank, that is to collect its own check, and not in furtherance of the scheme to defraud charged to have been devised by Hart and the other defendants.

Had Hart, on the other hand, presented the $75,000 L. S. U. check to the City Bank Branch for collection, in that case the bank would have been *his agent* for the purpose of collecting the amount of the check from the bank upon which it was drawn.

In that case the check would have been placed in the mail by the Bank to obtain payment of the check *for Hart*.

In that case the collection of the check would have been essential to the full consummation of the fraud.

In that case the final payment of the check by the City National Bank at Baton Rouge would have been a payment to the Whitney Bank *as agent for Hart*.

In that case the Whitney National Bank would not be the owner of the check but *the agent of Hart*.

In that case the letter would have been placed in the mail to further the scheme to defraud, and in that case Hart would have caused the letter to be placed in the mail in furtherance of the scheme to defraud.

The Circuit Court of Appeals, in overruling the defendants' contention that when Hart presented the $75,000 L. S. U. check to the Whitney National Bank, the Whitney National Bank cashed said check, the scheme to defraud was at an end, stated as follows:

> "This case is different. The scheme here set out in the indictment and proved at the trial was one to defraud Louisiana State University, not one to defraud the Whitney Bank. The scheme to defraud was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded. Louisiana State University and Agricultural and Mechanical College, the State and its taxpayers, sustained no actual loss until the check had been finally paid, and it is clear that before the L. S. U. account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated."

It is evident that the Circuit Court of Appeals, in so holding, overlooked the fact that the bank, by cashing the check and paying to Hart its face amount, became a *bona fide* holder for value of said check. It is elementary that the drawer of a check has no legal right to revoke his check, that is "stop payment", after the instrument has passed into the hands of a *bona fide* holder for value. Fraud relating to the consideration for which the instrument was given is never a defense in an action thereon by a *bona fide* holder in due course. *While the scheme*

was not at an end when Hart endorsed and presented the check to the bank, it was at an end when the bank cashed the check for Hart. While the Louisiana State University sustained no actual loss until the check was finally paid, the moment the check was cashed by the Whitney National Bank it became liable to the bank for the amount of the check and at that very moment the defendants collected the spoils of their alleged fraud and the scheme, as to them, was fully consummated and at an end.

Had the University intervened, and without legal right stopped payment on the check, it could not have stopped its liability to the Whitney National Bank upon the check. The fraudulent scheme would not have been frustrated by such intervention. The fraudulent scheme was fully consummated, and the spoils of the alleged scheme fully realized, upon the sale of the check by Hart and its purchase by the bank.

It is clear that Louisiana State University could not stop payment on its check after the check had come into the hands of a third person for value received, but would have been compelled to seek recourse against the original holder, and against him alone.

The Circuit Court's opinion is obviously in error in this respect and contrary to and in conflict again with the jurisprudence of the United States Supreme Court.

U. S. vs. Guarantee Trust Co., 293 U. S. 340;
U. S. vs. National Exchange Bank, 270 U. S. 527;
Burton vs. United States, 196 U. S. 283.

Inasmuch as the letters charged to have been caused to be placed in the mails by the defendants in furtherance of the scheme to defraud were placed therein after the check was cashed and the alleged scheme fully consummated, it is clear that said letters could not be in furtherance of the scheme to defraud. Therefore even though the use of the mail by the Whitney Bank in collecting its own check were chargeable to the defendants, such use would not constitute a violation of the statute.

On the other hand, whether the alleged scheme was completed or not by the cashing of the check, *the unanswerable proposition still faces your Honors that the banks "in no sense" could* have been the agents of Hart, and the so-called chain of "causation" cannot exist save through the intervention of an agent, even though he be an innocent agent.

THIS WAS ALSO AN IMPROPER AMENDMENT OF INDICTMENT.

We have shown that the indictment as returned by the grand jury charged that the defendants had caused the two mailings complained of in the two counts through the federal reserve branch and the Baton Rouge bank, *acting as agents of the defendants.*

We have shown that, in the face of the grand jury's finding, the trial judge told the jurors they could ignore this averment of the indictment as "surplusage".

Petitioners, accordingly, were convicted of an offense not set out in the indictment and not committed in the manner and form set out in the indictment; and, therefore, there was a fatal variance between the allegations of the indictment and the proof offered to support the same, to the extent that your petitioners were convicted of committing an offense in a manner and form different from the manner and form charged in the indictment.

Petitioners respectfully submit that, in affirming the action of the trial judge on this point, the Circuit Court of Appeals differed from and was in conflict with the following decisions of the federal courts:—*Ex Parte Bain*, 121 U. S. 1; *Vann vs. U. S.*, 76 F. 809; *Naftzger vs. United States*, 200 F. 494; *Norris vs. U. S.*, 281 U. S. 621, 74 L. E. 1076.

In the syllabus of the *Bain* case, the United States Supreme Court said:

> "When this indictment is filed with the Court no change can be made in the body of the instrument by order of the court or by the prosecuting attorney, without a resubmission of the case to the Grand Jury. And the fact that the court may deem a change immaterial, as striking out of surplus words, makes no difference. The instrument is thus changed, it is no longer the instrument of the Grand Jury which presented it."

And on page 4 of the *Bain* case opinion, the United States Supreme Court said:

> "The learned Judge goes on to argue that the Grand Jury would have found the indictment without this

> language, but it is not for the Court to say whether they would or not, the party can only be tried on the indictmnet as found by such Grand Jury and especially upon its language found in the charging part of that instrument."
>
> *Ex Parte Bain, 121 U. S. 1, 30 L. E. 849;*
> *U. S. vs. Alfred E. Norris, 281 U. S. 621, 74 L. E. 1076.*

The defendants requested a special charge that the burden was on the government, under the indictment, to prove that the banks in question were the agents of the defendants in causing the use of the mails. The trial court, instead of giving the requested special charge, instructed the jury that it was not necessary for the government to prove essential averments in the indictment, and that the banks were not the agents of the defendants, and that the jury should treat that allegation of agency as surplusage; the judge thereby not only instructing the jury that they could convict defendants of an offense not set out or alleged in the indictment, but also substituting himself for the grand jury by amending the indictment.

The Trial Court having found from the evidence that there was no agency existing between the defendants and the City branch of the Whitney National Bank, the Whitney National Bank and the New Orleans branch of the Federal Reserve Bank should have instructed the jury that a substantial and necessary element of the offense charged in the indictment had not been proven by the Government, and that, therefore, a verdict of not guilty should be rendered.

The Trial Court having found that the substantial and necessary element of the offenses as charged in the indictment found by the Grand Jury had not been proven by the Government fatally erred in amending the indictment by eliminating that part of the indictment referring to the relation of agency existing between the defendants and various banks, and instead of amending the indictment and treating these averments of the indictment as surplusage, should have instructed the jury that the Government had failed to establish its case as laid in the indictment, and should have directed a verdict of acquittal. More especially is this true since the defendants depending upon their right to be tried and to defend against the crime as described and set forth in the indictment, requested the following special charge from the Court covering the allegations of agency in the indictment:

> "I charge you that the burden of proof is upon the Government to prove beyond a reasonable doubt that the City Bank Branch of the Whitney National Bank in New Orleans, the Federal Reserve Bank in New Orleans, and the City National Bank of Baton Rouge, Louisiana, were the agents of the defendants in forwarding checks or letters as alleged in the indictment." Assignment of Errors No. 14 (Record 2, page 1020).

As above stated the defendants believed that they were being tried upon the offense committed through agents and they continued to so believe until after all the evidence had been heard and their special charges were handed to the Court for its consideration and were taken entirely by surprise when the Court, instead of giving the charge above quoted, charged the jury that it was not

necessary for the Government to prove essential averments in the indictment, and that the banks were not the agents of the defendants and that the jury should treat that allegation of agency as surplusage; thereby not only instructing the jury that they could convict defendants of an offense not set out or alleged in the indictment, but also substituting himself for the Grand Jury by amending the indictment.

If the judge had given the special charge requested, as the defendants had a right to expect he would, and the government had not proven the agency beyond a reasonable doubt (and the trial court found and charged the jury that the evidence showed that the relation of agency *did not* exist between the defendants and the banks) then the defendants would have, undoubtedly, been entitled to an acquittal; and the court holding the view, as it did, that the government had failed to prove the agency as laid in the indictment should have directed a verdict of not guilty.

Not only should the verdict of not guilty been directed under the trial court's own finding of the fact, but it should have also been directed because the proof was at variance with the allegation of the indictment, and the amendment of the indictment was illegal and beyond the power and authority of the court.

U. S. vs. Vann, 76 Fed. 809.

THE MAILING UNDER THE SECOND COUNT.

The Circuit Court of Appeals has found that the crime if any was committed, was consummated and ended when the check was presented to the City National Bank of Baton Rouge for payment.

> "Louisiana State University and Agricultural and Mechanical College, the State, and its taxpayers, sustained no actual loss until the check had been finally paid, and it is clear that before the Louisiana State University account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated." (Opinion.)

The letter of acknowledgment (of the cash letter), which is the basis of the second count, was not mailed until after the check had been presented to the City National Bank of Baton Rouge, and honored, and the amount charged to Louisiana State University. Therefore, under the Circuit Court's own opinion, the fraud, if any, was consummated and ended; and the mailing of the letter of acknowledgment, which is the basis of the second count, could not have been in furtherance of the perpetration of the scheme to defraud set out in the indictment.

We submit that the second count is fatally defective under the opinion of the Court of Appeals, and under any view of the case, the conviction and sentence under that second count should be set aside.

CONCLUSION.

Important as this case is to the lives and careers of the appellants themselves, it has become almost of greater importance in the legal history of the nation.

It represents today the peak point of the encroachment of federal jurisdiction upon local crime through mail fraud prosecution. The government's success in the case thus far, as we have tried to indicate in the foregoing brief, has resulted from a process of nibbling a favorable point here and there until the whole picture is given what appears to be a favorable complexion.

From the declaration of Mr. Justice Peckham in the *Burton* case that the bank could be "in no sense" the agent of the defendant in the mailing of the check, we have inched a little further to the statement of Judge Borah that the bank could not, "in the strict legal sense" be such an agent.

From the logic of the probable consequence rule as laid down by Mr. Justice McKenna in the *Kenofskey* case, that "causation" existed because the insurance company superintendent "became Kenofskey's agent" for the purpose of mailing the false proofs, we have again inched forward to Judge Borah's jury instruction that an agent is not essential to "causation".

We respectfully urge that the issues raised by this case are serious and important ones, that the errors of law

complained of present rulings contrary to the established jurisprudence of the United States Cupreme Court, and that, to the end that those errors may be rectified, a writ of certiorari should issue.

Respectfully submitted,

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